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IN THE
Supreme Court of the United States
OCTOBER TERM, 1946

F. C. MOSER, *Petitioner,*

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, and BRIEF IN SUPPORT OF PETITION

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1446 Dexter Horton Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioner's Amended Complaint contained four causes of action. The judgment of the lower courts as to the First, Second, and Fourth Causes of Action has been acquiesced in by petitioner. The action of the lower courts as to the Third Cause of Action is herewith presented to the United States Supreme Court for its adjudication. The issue involves the rights of so many thousands of Nylic life insurance agents and is so very vital to millions of respondent's policyholders throughout the world, that petitioner deems that the final adjudication of this highest court should be sought upon the question.

Petitioner's Third Cause of Action in his Amended Complaint was disposed of prior to trial by the trial court rendering a Memorandum Opinion that such Third Cause of Action failed to state a claim upon which relief can be granted (R. 147-152) and thereafter entering an order dismissing such Third Cause of Action (R. 145-146).

The Third Cause of Action in the Amended Complaint, with pertinent references to explanatory facts detailed in paragraphs incorporated from the First and Second Causes of Action, from the Petitioner's Bill of Particulars, and from contracts attached as Exhibits, sets forth petitioner's claim for damages for respondent's wrongful action in this case.

Therefrom it appears that petitioner became a part-time agent of respondent on October 7, 1907, and a full-time agent on January 1, 1908. Subsequently, in July, 1910 (R. 27) respondent formed among its agents a contract of benefits and compensations designated by it as "Nylic," at which time the parties then entered into "Nylic" contractural relations. The word "Nylic" is formed from the first letters of the words "New York Life Insurance Company."

The Nylic contract signed by petitioner and accepted by respondent (R. 493) reads:

> To the New York Life Insurance Company,
> No. 346 Broadway, New York City;
> August 17, 1910, in re Nylic No. 2.
>
> Gentlemen: I hereby make application for membership in Nylic, under the terms and conditions of Nylic as set forth in the company's

pamphlet entitled "Nylic No. 2," Edition of July, 1910, and in consideration of your acceptance of this application I agree to observe and be bound by each and all the rules and regulations, terms and conditions of Nylic as set forth in said pamphlet, and especially agree so long as I remain a member of Nylic to devote all my time, talents and energies to the company's service in soliciting personally for business.

I have devoted my whole time to the company's service in soliciting for applications during the years 1908, 1909, 1910, and elect to take time credit for the years immediately preceding January 1, 1911, following, to-wit: 1908-1909-1910.

I was born on the 14th day of January, 1879.

Yours truly,

F. C. MOSER.

Accepted this 26th day of September, 1910, time credit to be given for the years 1908, 1909 and 1910.

NEW YORK LIFE INSURANCE COMPANY,

By Thomas A. Buckner,

Vice-President.

Nylic No. 2 (Ex. "F," R. 91-112) which is made a part of petitioner's written Nylic contract just set forth (R. 493) is an elaborately detailed recital of facts beneficial to respondent's millions of policy-holders and to petitioner as respondent's agent. Said Nylic contract is beneficial to respondent's millions of policy-holders for the following reasons: (1) it immeasurably reduced respondent's agency expense; (2) it materially lengthened the period of continuous service of the Qualifying Nylic agents; (3) it engendered a higher degree of honesty, loyalty, fidelity and achieve-

ment among respondent's Nylic agents; (4) it created a fiduciary relation between respondent and its Nylic agents; (5) and in finality it created—which was its principle objective—a corps of highly experienced, dependable life-time Senior Nylic agents.

Obviously, the principle benefit that petitioner was to receive from his Nylic contract was that ultimately he would become a Senior Nylic agent whose contract could be terminable only for cause, thereby permitting petitioner to cash in on his experience, good-will and extensive clientele which he had built during his 20-year probationary period.

Apropos, the opinion of respondent's Inspector of Agencies, Mr. R. E. Whitney, is highly pertinent. He wrote to petitioner under date of January 5, 1928, as follows (R. 135):

> "Twenty years of the kind and character of service you have rendered in your connection with the New York Life Insurance Company entitles you to more than congratulations, even more than a *permanent* income with our Company.
>
> "The fact that you have built up such a wonderful clientele which will so much for your future business and future profit is one of the greatest benefits you will deprive from your great work in the past. You have made a record to be proud of."

In this same connection, Mr. Walker Buckner, respondent's Vice-President, under date of December 29, 1927, wrote the following pertinent paragraph to the petitioner (R. 136):

> "I trust that in your becoming a Senior Nylic

you will enjoy the fruits of your experience, the same as so many other Senior Nylics have, by a largely increased yearly production."

Of a similar tenor, are the letters to petitioner by Second Vice-President L. Seton Lindsay, Inspector of Agencies, A. S. Elford, and Agents' Counselor, Mr. E. E. Andrews.

Mr. Lindsay wrote, December 30, 1927, as follows (R. 137):

"Our New Year's Bulletin carries the announcement that subject to final qualifications you are now a Senior Nylic. Please let me be among the first to congratulate you.

"There is a feeling of satisfaction in accomplishing a purpose, and when the effort required to reach the goal extends over a period of twenty years it is indeed a real achievement."

Mr. Elford, under date of January 25, 1928, wrote as follows (R. 138):

"Your Senior Nylic membership, along with your great continuity of purpose for twenty years in Nylic, is worthy of my warmest congratulations to you. Your personality and presence here with us in Seattle is a source of great satisfaction to me and strength to the agency."

Mr. Andrews, under date of January 3, 1928, wrote as follows (R. 139-40):

"My dear Old Timer: At last the above greeting is entirely appropriate, for you have definitely landed among the Old Timers. If you run true to form and precedent, these next few years will be the biggest and most successful of your entire career."

All Nylic agents were also given writing agreements in the form of agency contracts. These agency agreements of necessity would have to be changed from time to time and from period to period largely due to either improvement or recession in business, thereby either increasing or lowering the Nylic's commission; or a new type of policy would be adopted and commissions therefor would have to be made in a new agreement; consequently these temporary agreements were subject to termination on 30 days' written notice by either party, with or without cause, however without effecting or altering the foundational Nylic contract. Such agency agreements are here designated as Exhibits "C" (R. 80-90) and "D" (R. 50-65). It is a pertinent fact that while the parties changed or altered the temporary agency agreements from period to period such as Exhibits "C" and "D," the master Nylic contract has never been changed or altered.

As petitioner more extensively cites later on in this brief the courts can take judicial notice of governmental records. Mr. Thomas A. Buckner, Chairman of the Board of the New York Life Insurance Company, while testifying before the Temporary National Economic Committee, in 1939, gave adequate reasons why the Company's agency agreements must be cancellable upon 30 days' written notice. He testified as follows:

> "Many new elements have entered into the picture in the last 10 years so that all previous calculations and previous methods of doing business

have to be revised. In this connection the company officials have to take into account the rise and fall in business cycles, the effect that conflict with other nations has upon security values, whether the values consist of real estate or stocks and bonds, economic uncertainty, political uncertainty, safety of assets, and amount of reserve." (page 1425)

Hearings before the Temporary National Economic Committee, Congress of the United States 76th Congress, 1st Session. Public Resolution 113, Part 4 Life Insurance, pages 1424-1425.

Each of such agency agreements contained a 30-day cancellation clause (Ex. B, R. 76, par. 18; Ex. C, R. 86, par. 18; Ex. D, R. 58, par. 20). During the 20-year qualifying period the Nylic contract was likewise terminated if the agency agreement was permanently cancelled (Ex. F, R. 111-112, par. XII). But subsequently, after petitioner became a Senior Nylic, the termination of the agency agreement by respondent, could not alter or affect petitioner's Senior Nylic membership (Ex. D, R. 65, par. 23; Ex. F, R. 111-112, par. XII). Petitioner's Amended Complaint further recited:

"That said 'Nylic' on and after September 26, 1910, was combined with each successive agency agreement entered into between the plaintiff and the defendant corporation and thereby became a part of the operating contracts under which the parties hereto operated; that as of January 1, 1910, the renewal commissions paid by the defendant to the plaintiff were reduced and the payments under 'Nylic' were supplied to replace

in whole or in part the amount of such reductions in renewal commissions; and the payments under 'Nylic' became a part of the compensation agreed to be paid to the plaintiff for the services rendered to the defendant by the plaintiff.

"That the qualifying period of 'Nylic,' already referred to, was from January 1, 1908, to January 1, 1928, according to the terms of 'Nylic No. 2,' as set forth in 'Exhibit F' hereto attached. That on January 1, 1928, after twenty (20) years of full-time, continuous and faithful service to the defendant, plaintiff qualified and was accepted as a 'Senior Nylic' by the defendant; that it was an express and implied provision in his employment contract that he was to be employed and was to work for defendant for life, unless said contract was terminated for cause.

"That in qualifying for 'Nylic' and in working for defendant continuously and faithfully for approximately twenty-eight (28) years, plaintiff became closely associated with the defendant company, built up a large clientele which would purchase policies from only the defendant company, and plaintiff in devoting himself exclusively to the work of defendant corporation as a profession gave up his career in banking and spent the most fruitful years of his life in the services of the defendant company. Nevertheless, on or about the 23rd day of July, 1936, the defendant arbitrarily, in bad faith and without cause terminated and cancelled the plaintiff's said contract with the defendant already referred to because of malice and to avoid payment of benefits and renewal and conversion-commissions to the plaintiff, thereby preventing the plaintiff from further performing his contract with the defend-

ant and disqualifying him from earning a livelihood in the only profession and for the only company he was fitted and trained to serve.

"That the plaintiff has in every manner complied with the terms of his contract with the defendant except insofar as he has been prevented by the action of the said defendant in wrongfully discharging the said plaintiff. That the plaintiff has been maliciously and wrongfully prevented by the defendant from further performing his contract with the defendant in violation of all express and implied promises and representations made by the defendant and its agents to the said plaintiff; that after relying on said promises and representations, the plaintiff has in the prime of life been prevented by the defendant from earning a livelihood in his life's profession either with the defendant or any other life insurance company, and the defendant has maliciously and wrongfully taken and deprived the plaintiff of the benefit of the said plaintiff's experience, association and good-will built up over a period of twenty-eight (28) years of service in the defendant's organization."

For 15 years prior to his discharge petitioner had been earning an annual-compensation of $28,500.00 per year, and his prayer for damages was for such sum during the remaining expectancy years of the Nylic contract, or a total of $485,864.42 (R. 37).

The trial court sustained Respondent's Motion to Dismiss the Third Cause of Action above set forth. The reasons assigned by the trial court in its memorandum opinion (R. 147-152), were that the Agency Agreement (Ex. D, R. 50-64, par. 20, page 58),

contained the provision, "Either party hereto may without cause terminate this agreement upon 30 days' written notice;" (R. 147) that a Senior Nylic does not have to be an agent for life (R. 149) with permanent employment (R. 150) and that such Senior Nylic had exchanged his right to such life agency by accepting the terminable agency (Ex. D, R. 50-65) entitling such agent to greater compensation (R. 151). The formal order dismissing the Third Cause of Action duly followed (R. 145-146).

Upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, said court duly affirmed the judgment of dismissal by the lower court, without rendering an opinion of its own (R. 1199).

JURISDICTIONAL STATEMENT

Petitioner is a resident of the State of Washington. Respondent is a foreign corporation doing business in the State of Washington (R. 26-27). The judgment of the United States Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court, was filed and entered on March 11, 1946. The order denying the Petition for Rehearing was filed by the said Circuit Court of Appeals on June 21, 1946 (R. 1200) and an order was thereafter entered by said court withholding its mandate until July 31, 1946, to enable petitioner to file his Petition for a Writ of Certiorari herein. It is contended that the United States Supreme Court has jurisdiction to review the judgment here in question under Section 240 of the Code of Civil Procedure, as amended by 28-

U.S.C.A., Section 347. The questions involved in this case are of transcending importance; (1) to the respondent's millions of policy-holders, which include petitioner; (2) to the respondent's many thousands of qualifying and Senior Nylic agents and their dependents; (3) to all life insurance companies who have to compete with the intrigues of the Nylic contract; (4) because through blacklisting and restrictive Nylic covenants the respondent has prevented petitioner from earning his customary livelihood either with respondent or any other life insurance company.

QUESTIONS PRESENTED

1. Petitioner as a Senior Nylic agent of respondent is under contract "so long as he remains a member of Nylic, to devote all his time, talents, and energies to the Company's service in soliciting personally for business" (R. 97), "shall not enter the service of any other life insurance company" (R. 106), and "can have no other business or occupation for profit or gain" (R. 109). Can respondent without cause dismiss petitioner as its agent and refuse to permit petitioner to earn his usual commissions for insurance during the existence of his Senior Nylic contract?

2. Since Senior Nylic agents are bound to work only for respondent is there not a mutually correlative duty on the part of respondent that such Senior Nylic agents shall have the right to regular employment by the company the same as other Senior Nylic agents of the Company?

3. If such dismissal of a Senior Nylic agent from

employment without cause is effectuated by respondent, should not petitioner receive damages for such breach of contract?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Obviously, since the judgment of the United States Circuit of Appeals for the Ninth Circuit was merely an affirmance of the opinion of the United States District Court for the District of Washington, Northern Division, it is necessary to examine the reasoning of the Opinion of the District Court and the conclusions drawn therefrom by the District Judge (R. 147-152).

According to such Memorandum Opinion there seem to be three major reasons advanced by the district judge for holding that Petitioner's Third Cause of Action failed to state a claim upon which relief could be granted.

The points thus raised in such Memorandum Opinion, and petitioner's answers thereto, are set forth at length in the Brief attached to this Petition. Consequently, for the purposes of this Petition it would seem sufficient to make merely a brief statement herein of such points and answers.

Point I. The court asserts that Petitioner's Agency Contract with respondent (Ex. D, R. 50-65) contained a cancellation clause whereby the contract was terminable upon 30 days' written notice (R. 147-148-151-152).

Answer. The cancellation of the agency contract "in no way could alter or affect Petitioner's Senior Nylic membership" (Ex. D, R. 65, par. 23). Admittedly petitioner still was bound by his Senior Nylic contract and the cancellation of the agency contract did not cancel the Nylic contract but left the respective parties thereto under the duties and obligations of such Nylic contract. Petitioner still continued subject to the Nylic clauses that he could "Have no other business or occupation for profit or gain" (Ex. F, R. 109, par. 1) and could "not enter the service of any other life insurance company" (Ex. F, R. 106, Senior Nylics). Petitioner contends that so long as he continues to be a Senior Nylic there is a reciprocal duty on the part of respondent to permit petitioner to earn compensation from the respondent on the same terms and conditions as are accorded other Senior Nylic agents.

Point II. The court asserts that there is no language in petitioner's Nylic contract (R. 493 and Ex. F, R. 91-112) which entitles petitioner to "life" or "permanent" employment by respondent (R. 148, 149, 150).

Answer. The recent decisions of this court have established the doctrine of "fair play and substantial justice." Under such a doctrine, as established also by the Supreme Court of the State of Washington, since petitioner by his Senior Nylic contract could not work elsewhere or for any other insurance ocmpany, there is implied a corresponding and correlative obligation on the part of respondent to permit petitioner to earn his insurance commissions under the same

terms and conditions as are accorded other Senior Nylic agents.

International Shoe Co. v. State of Washington, 68 Sup. Ct. Rep. 154, at 158, 160;

Byrne v. Bellingham Cons. School Dist., 7 Wn.(2d) 20 at 29-30;

McCartney v. Glassford, 1 Wash. 579 at 581-582.

Point III. The court asserts that petitioner exchanged his right to a life agency under his Nylic contract, if he had such life agency, for a terminable agency (Ex. D, R. 50-65) entitling him to a higher compensation (R. 151-152).

Answer. There is no allegation in the complaint, nor any factual matter stated in any of the exhibits nor in the Bill of Particulars, to substantiate the conclusion of the District Court either that petitioner exchanged any provisions of his Senior Nylic contract for an Agency contract; (Ex. D, R. 50-65) or, that under such agency contract petitioner became entitled to a higher compensation. Petitioner demonstrates with particularity in his Brief attached hereto, the fallacy of any such reasoning by the District Court.

In addition to the foregoing reasons, petitioner is entitled to have his writ granted for the following *special, important and legal reasons*:

(a) The petitioner is a Senior Nylic. There are over one thousand (1,000) living Senior Nylics. Most Senior Nylics are married and have family and relative obligations or dependents. In addition there are probably about five thousand (5,000) Freshmen,

First Degree, Second Degree and Third Degree Nylics (also called Qualifying Nylics) who are struggling to acquire the Senior Nylic status. As the Nylic contract admittedly is the back-bone of the New York Life Insurance Company agency business and, no doubt, will be practiced for many years in the future (it has now been practiced by respondent for 50 years) there will be literally tens of thousands who will become qualifying and senior Nylics. Thus, all in all, this action involves directly and indirectly many thousands of individuals and will constantly involve many more thousands, since each year a substantial number of qualifying Nylics acquire Senior Nylicship.

(b) The Nylic contract and the Nylic agents have made the New York Life Insurance Company the great and powerful company that it is. The New York Life is a *mutual company* numbering a few million policyholders, who will be affected either favorably or unfavorably by this action. The Nylic contract either provides life employment for a Senior Nylic as contended herein by petitioner or else it is a delusion and a fraud, and as such it should be exposed. If the Nylic contract is the contract as alleged and contended by petitioner, then the policyholders of the company will profit to the extent of millions of dollars; if it is not, and is the contract that respondent is attempting to establish in order to defeat this action and hedge liability, then, in that event the policyholders will lose millions of dollars. The whole esprit de corps of all of the Nyic agents of respondent is affected by this action.

The Nylic agents are the life-blood of respondent

company. Anything that adversely affects this large body of just plain folks and their dependents who are outstanding for their loyalty, honesty, fidelity, achievements, and dependability will commensurately adversely affect the policyholders of this company. If this Nylic contract has the status as set forth by petitioner the policyholders in the future will not only secure more Nylic agents, but better Nylic agents, which translated into money will mean millions of dollars to them. If it is the contract that respondent in this action argues that it is, then, in that event the company in the future will unquestionably secure fewer Nylic agents and of an inferior quality, which translated into money will mean the future loss of millions of dollars to respondent's policyholders. By every rule of law, sound business, fair play and substantial justice it will be markedly to the future financial welfare of the policyholders of this mutual company that this court clarify this Nylic contract in the reasonable status as contended by the petitioner.

(c) This Nylic contract must be construed in the light of the laws of the State of Washington. The District Court and the Circuit Court of Appeal have not taken judicial notice of, nor given legal effect to, the Washington Supreme Court cases which should have a decided bearing on this action. Such cases are set forth at length in the attached Brief.

(d) Neither the District Court nor the Ninth Circuit Court of Appeals have taken judicial notice of, nor given legal effect to, other applicable federal and state decisions and especially the decisions of the United States Supreme Court among which are those

which involve the "Traditional Notions of Fair Play and Substantial Justice" hereinafter cited.

(e) This respondent through restrictive covenants in its Nylic contract and by causing petitioner to be blacklisted by other companies and by disseminating to them false information about petitioner so that they will not employ him, have had the effect and were intended to have the effect of depriving petitioner of his lawful right to earn his livelihood.

The New York Life Insurance Company is the only life insurance company which practices a Nylic contract. All other companies use a single straight renewal contract. The New York Life Insurance Company secures many of its Nylic agents in competition with other companies by representing to prospective agents that the Nylic contract has the status which petitioners herein contends. Moreover all other companies have been propagandized by petitioner into believing that the Nylic contract has this same status. If this court shall decree that the Nylic contract does not have this status (which respondent's competitors are dying to know) but has the status which the respondent in this action contends, then the many powerful competitors of respondent will so expose and blast this Nylic contract and this whole Nylic scheme (as they rightfully should) that the policyholders of the Company will suffer tremendously by not only securing fewer agents, but agents of an inferior quality, which situation translated into money will mean the eventual loss of millions of dollars. Any construction put upon the Nylic contract other than that contended by petitioner and so represented and interpret-

ed by respondent for petitioner, will destroy the faith of all Nylics in the Senior Nylic status and undermine the inestimable value of the esprit de corps and loyalty which the Nylic contract has thus far engendered in all Nylics, thereby causing the policyholders serious losses in prestige and money.

Wherefore your petitioner prays that a Writ of Certiorari issue under the seal of this court, directed to the Circuit Court of Appeals, for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case number and entitled on its docket No. 11073, *F. C. Moser*, Appellant, v. *New York Life Insurance Company*, a corporation, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this court, and for such further relief as to the court may seem proper.

Dated this 23rd day of July, 1946.

DANIEL B. TREFETHEN,
Attorney for Petitioner.

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OPINIONS OF COURTS BELOW

The opinion of the U. S. District Court of the State of Washington was rendered March 12, 1943 (R. 147-152). The judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming the lower court's opinion, was rendered March 11, 1946 (R. 1199). The order denying Petitioner's Petition for Rehearing by the Circuit Court of Appeals was entered June 21, 1946 (R. 1200).

JURISDICTION

1. The date of the judgment to be reviewed is June 21, 1946, when the Petition for Rehearing was denied by the Circuit Court of Appeals for the Ninth Circuit.

2. The statutory provision which is believed to sus-

tain the jurisdiction of this court is Section 240 of the Code of Civil Procedure, as amended by 28, U.S.C.A., Section 347.

3. The opinion of the Circuit Court of Appeals for the Ninth Circuit that though petitioner is bound by his Senior Nylic contract whereby he "can have no other business or occupation for profit or gain" and "shall not enter the service of any other life insurance company," yet respondent does not have the reciprocal duty to employ petitioner to sell its insurance policies, is in conflict with the decisions of the Supreme Court of the State of Washington in the cases of *Byrne v. Bellingham Cons. School Dist.*, 7 Wn.(2d) 20 at 29-30; *McCartney v. Glassford*, 1 Wash. 579 at 581-582; and *International Shoe Co. v. State of Washington*, 66 S. Ct. Rep. 154, 158, 160.

STATEMENT OF THE CASE

This case has already been stated in the preceding petition for the Writ of Certiorari which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals for the Ninth Circuit erred in affirming the order of the U. S. District Court dismissing Petitioner's Third Cause of Action, and in refusing Petitioner's Petition for Rehearing.

ARGUMENT

SUMMARY OF ARGUMENT

Point I. Cancellation of the agency agreement (Ex. D) did not terminate petitioner's right of employment by respondent.

Point II. Senior Nylic agents are entitled to employment by respondent during the existence of the Senior Nylic contract.

Point III. Petitioner never exchanged his Senior Nylic agency right of employment for a terminable agency at a higher compensation.

Point I

Concellation of the agency agreement did not terminate petitioner's right of employment by respondent.

To one not versed in the intricacies of life insurance agents employment contracts and the interpretation thereof, the obvious opening inquiry is, What is this Nylic contract?

Petitioner asserts that the Nylic contract is the most diabolical unilateral slave contract that was ever devised by a huge designing corporation to first lure its victims (the Nylic agents) and thereafter either enslave them for their natural lives or else confiscate all of their withheld pay, which pay was withheld to bind them to respondent.

The Nylic contract governs two inordinately long periods of employment and compensation—the first period embracing 20 years commonly called the probationary or qualifying Nylic period and the second

period designated by respondent as the Senior Nylic or life-time period.

The Nylic contract says to the Qualifying Nylic agent you must work exclusively and continuously for respondent during the first 20 years during which time you cannot have any dealings with any other life insurance company; you cannot accept brokerage business or employ sub-agents; that only your personally solicited and procurred business will count in Nylic; that you can have no other business or occupation for profit or gain; that you cannot go to or solicit business in any territory in which Nylic is not practiced by the respondent; that you must produce each year during the 20 years a designated sum of new business; that if you fail in any of these matters you will be discharged and the respondent will confiscate all of your withheld pay and other sums; that if you resign during said 20 years the respondent will confiscate all of your withheld pay and other sums; that if the respondent discharges you during the said 20 years, with or without cause, the respondent will confiscate all of your withheld pay and other sums.

The Nylic contract says to the petitioner as a Senior Nylic that you cannot enter the service of any other life insurance company; that you can have no other business or occupation for profit or gain; that if you fail in this wise the respondent will discharge you and confiscate all of your life-time Senior Nylic monthly income and other sums; that if you work at all, you must work exclusively for respondent for so long as you are a member of Nylic.

"Nylic No. 2" is set forth at length in the record

(R. 91-112). The following representations and statement of facts are taken therefrom. "It has been established in order to *give permanency* and character to the work of the soliciting *agent*" (R. 92). "Nylic will * * * stop what may be called 'waste' in the creation of our business" (R. 93). "The first problem that faces the management of the agency department in a growing and successful company is how to secure, educate *and keep* agents of the right character and capacity" (R. 93). "If a company has in its employ several thousand agents an inspection of its books will show that their average term of service is only a few years" (R. 94). "Any plan, therefore, which has for its object *permanency* of service, inseparably associated with personal honesty, loyalty, fidelity, and achievement on the part of an *agent* must tend to reduce expenses and at the same time elevate the business of life insurance. It is believed that Nylic directly subserves these purposes" (R. 95). "Any plan, therefore, which shows a man who is about to enter upon the business of life insurance his bests interests all lie in persistent and continuous service * * * must benefit the profession. Nylic is such a plan" (R. 96).

On July 23, 1936, Appellant's agency agreement (Ex. D., R. 50) was terminated (R. 390). Such termination by the ompany was without just cause and was legally indefensible.

HOWEVER, SUCH TERMINATION NOTICE DID NOT CANCEL APPELLANT'S SENIOR NYLIC CONTRACT. The agency agreement (Ex. D) is specific in stating "IT BEING UNDERSTOOD AND

AGREED THAT THE EXECUTION OF THIS AGREEMENT SHALL IN NO WAY ALTER OR AFFECT THE SECOND PARTY'S SENIOR NYLIC MEMBERSHIP HERETOFORE ACQUIRED SUBJECT TO ALL THE RULES, REGULATIONS AND CONDITIONS OF NYLIC No. 2 "(R. 65). IT IS THE APPELLANT'S CONTENTION THAT SO LONG AS HE IS A SENIOR NYLIC AND, AS SUCH, AN AGENT OF THE COMPANY, BOUND BY ITS RESTRICTIVE COVENANTS RECITED HERENABOVE, THAT HE "CAN HAVE NO OTHER BUSINESS OR OCCUPATION FOR PROFIT OR GAIN" (R. 109) AND THAT HE SHALL NOT ENTER THE SERVICE OF ANY OTHER LIFE INSURANCE COMPANY (R. 106). THERE IS INHERENT IN SUCH RELATIONSHIP THE CORRELATIVE AND RECIPROCAL IMPLIED RIGHT THAT THE COMPANY SHOULD PERMIT APPELLANT TO SOLICIT BUSINESS FOR THE COMPANY, AND RECEIVE COMMISSIONS THEREFOR, UPON THE SAME TERMS AND CONDITIONS AS OTHER SENIOR NYLICS ARE PERMITTED TO EARN THEIR LIVING.

According to the memorandum opinion of the lower court (R. 151) "the parties agreed that the agency might be terminated by either party without cause *but that the Senior Nylic membership should nevertheless continue.*"

THUS, WHILE APPELLANT REMAINS A SENIOR NYLIC HE REMAINS AS AN AGENT OF THE COMPANY AND AS SUCH AGENT IT

IS IMPLIED THAT HE CAN CARRY ON HIS LIFETIME BUSINESS OF EARNING HIS COMMISSIONS FOR WHICH THE COMPANY SHOULD COMPENSATE HIM.

The result of Paragraph 23 (Ex. D, R. 65) *supra*, is either to make the employment contract subservient to all the rights heretofore acquired by appellant under Nylic No. 2 (Ex. F), or in any event to render the effect of the execution of the employment contract so uncertain and ambiguous as to allow the introduction of parole evidence as outlined in appellant's bill of particulars (R. 125).

The bill of particulars sets out the following facts in support of the complaint:

> "A. S. Elford, in the capacity of Inspector of Agencies of defendant's Western Department in Seattle about August 1, 1928, represented to plaintiff that Agency Agreement, Plaintiff's Exhibit 'D' was simply a commission contract and that Section 20 of the Agency Agreement (plaintiff's Exhibit 'D') did not apply to plaintiff as a Senior Nylic."

Evidence of this nature is admissible whenever there is an uncertainty as to the nature of an instrument or the intention of the parties to execute the contract; thus, conversations during negotiations may be shown in construing a contract in case of doubt as to meaning of words.

Joy v. Rousseau (Cal. App.) 236 Pac. 972.

Intention of parties to an ambiguous contract may be shown by oral testimony and circumstances surrounding a contract.

Russell v. Mutual Lumber Co. (Wash.) 246 Pac. 580;

Causten v. Barnette (Wash.) 96 Pac. 225.

Petitioner is entitled also to the benefit of the rule where the instruments are prepared by one of the parties to the contract that in event of any uncertainty or ambiguity those instruments are to be construed more strongly against the parties preparing said contract.

12 Am. Jur. 795, contracts, Section 252;

Bevans v. Muir (Wash.) 101 Pac. 485; 32 L.N.S. 588.

The same rule applies to the effect that in case of doubt or uncertainty in a contract, such doubt or uncertainty must be resolved in favor of promisee.

12 Am. Jur. 796, Contracts, Section 252.

There can be no doubt then that Paragraph 23 of Ex. D (R. 65) either expressly reserves to petitioner all his rights under this, his membership in Nylic No. 2 or in any event leaves the question in such doubt that the evidence concerning the statement of Mr. Elford made during the course of negotiations which lead up to the execution of said Ex. D are admissible to show that Ex. D did not in any manner affect petitioner's rights under Nylic No. 2, for at this stage of the case it must be assumed as a matter of law that the facts stated in the bill of particulars would be proven at the trial.

That a man can be so bound to a master with a reserved right in the master to discharge him without cause, after he has labored faithfully and exclusively throughout his active years in that employment, is

fitted for no other business, and still must refrain constantly from serving another master in the same, or any other business, unless he be given the right to work for that master, does violence to every concept of justice, and such is not the law.

It may be well to interject at this point the fact that the $354.89 monthly Senior Nylic payments to petitioner is not a graceful gratuity from the Company. Such sum is the amount that the Company's actuary has mathematically ascertained as being the total amount of the deferred renewal commissions withheld from the petitioner during his 20-year period and so withheld to bind him and thereafter distributed to him as a Senior Nylic in monthly payments during the period of his life expectancy. The respondent's use of such deferred renewal commissions during the 20-year period has proven profitable to the Company. So, no sympathy need be wasted upon the Company since it made money upon commissions withheld from the petitioner's own earnings.

Petitioner respectfully contends that the foregoing argument clearly demonstrates that since Petitioner cannot engage in other gainful pursuits to earn his livelihood, that he is in the same position as are other Senior Nylics, all of whom have the reciprocal and correlative right to demand from respondent employment as insurance sales agents during the existence of the Senior Nylic contract. Cancellation of the temporary agency contract does not relieve respondent of its duty to permit Senior Nylics to earn their regular compensation as Senior Nylic agents.

Point II.

Senior Nylic agents are entitled to employment by respondent during the existence of the Senior Nylic contract.

The District Court repeatedly reiterated its opinion that there is no language in the Senior Nylic contract which entitles such Senior Nylic to "life" or "permanent" employment by respondent (R. 148, 149, 150).

On the contrary, petitioner claims that no Senior Nylic can have any other business or occupation under the rule in Nylic No. 2 (Ex. F, R. 109) which provides "A Nylic" (which includes all Nylics of every degree including Senior Nylics, as no exception is made) "can have no other business or occupation for profit or gain" and further, that Senior Nylics "shall not enter the service of any other life insurance company" (Ex. F, R. 106) and by reason thereof respondent is duty bound to give petitioner employment and the right to earn his livelihood so long as petitioner remains a member of Nylic.

Senior Nylic agents under Nylic No. 2 are manifestly all Nylics, and as pointed out the rule is positive that no Nylic could enter any other business or occupation for profit or gain. If petitioner violated this rule, he was just as liable to have his Senior Nylic monthly compensation terminated as if he entered the service of another life insurance company. The result of these rules was that petitioner could not earn a living with any one else but respondent.

Respondent had received the full consideration from petitioner who had fulfilled the 20 years qualifying Nylic service. These 20 years were respondent's

beyond recall. Since the consideration was fully executed on petitioner's part, respondent is compelled to fulfill its part of the bargain. Moreover, petitioner submits that if he had violated these rules of Nylic No. 2 by entering another business or occupation for profit or gain or by entering the service of another life insurance company, respondent *could sue petitioner for damages for breach of contract.* After petitioner became a Senior Nylic we submit, that under the rules and regulations of the Nylic contract any gainful work, business or occupation on his part had to be for respondent only and no one else; that is, petitioner contracted to work for respondent exclusively so long as he remains a member of Nylic.

As previously indicated the issues in Petitioner's Third Cause of Action are unprecedented, and therefore this is a test case.

In this connection petitioner suggests that at any time prior to the expiration of the 20-year probationary period, the agent as well as the company could cancel the contract upon 30 days' notice. Thus, petitioner could have waived his reserved renewal commissions and, particularly, "could have entered into any other business or occupation for profit or gain" or he could have "entered the service of any other life insurance company. "The termination of an agent's contract and agency, *prior to his becoming a Senior Nylic,* or the removal or transfer of an agent, prior to becoming a Senior Nylic * * * terminates his Nylic membership and all his Nylic rights" (Ex. F, Par. XII (R. 111-112)). *But after petitioner became such*

Senior Nylic, he was irrevocably bound by such restrictive covenants.

Even if the petitioner had been willing after he was discharged by respondent to sacrifice his large lifetime monthly Senior Nylic of $354.89, and to sacrifice his Nylic Mortuary Benefits (deferred renewals) in excess of $8000 and to sacrifice other earned compensation by entering the service of another life insurance company in an attempt to earn his livelihood and his annual earnings in a sum of $28,500, he could not have done so because other life insurance companies would not employ petitioner as a result of respondent's wrongful act in

> "MALICIOUSLY DISSEMINATING FALSE AND DAMAGING INFORMATION REGARDING THE PLAINTIFF TO OTHER LIFE INSURANCE COMPANIES." (B/P, R. 126 (10))

Apropos, as brought out in the TNEC hearings referred to elsewhere in this brief, book part 10, pages 4633 to 4642, the New York Life Insurance Company was forced to disclose the secret operations of two bureaus, known as the Medical Insurance Bureau (MIB) and the Recording & Statistical Corporation (RSC), owned and conducted by the member companies which include respondent and practically all other life insurance companies of the United States and Canada. Every one who is conversant with the technique of said two bureaus, which use a code system to inform each company member about all phases of underwriting (which, of course, includes the soliciting agent) knows that it is next to impossible for a discharged agent of any member company to secure

life insurance employment, which is especially true if the agent has been discharged under a cloud as was the petitioner. The petitioner believes that his name is on the "Blacklist" of the MIB and the RSC (*supra*).

In sustaining a motion to dismiss on the grounds of no sufficient facts pleaded, plaintiff is entitled to have the facts pleaded together with all inferences therefrom construed most favorably to him.

McMillan v. Sims, 129 Wash. 516, 225 Pac. 240;

Klaskey & Mathson Co. v. Rothensies, 1 F R D 626.

In passing upon a motion for a directed verdict, court must give plaintiff the benefit of all evidence in his favor and every reasonable intendment therefrom.

Aitonen v. Morse, 136 Wash. 369, 240 Pac. 14;

A. B. Small & Co. v. Lamborn & Co., 267 U.S. 248, 69 L. ed. 597, 45 S. Ct. 300;

Swanson v. P. S. Electric Co., 118 Wash. 4, 202 Pac. 264.

Three Washington State Supreme Court cases sustain petitioner's contention, and since the United States Supreme Court gives credence to the interpretations of the State Supreme Court such cases should have greater weight than has been accorded them in the Circuit Court of Appeals in this case.

As the Supreme Court of the State of Washington said:

"The plaintiff claimed that this implied con-

tract was, that the defendant must provide a building in a proper state of forwardness, so that plaintiff's work could be installed within the time limited in its contracts with defendant * * * the rule is undoubted * * * that an implied contract arose on the part of defendant to keep the work on the building * * * in such a state of forwardness as would enable the plaintiff to complete its contract within the time limited." In *State v. Feigel*, 178 N.E. 435, a similar controversy arose over the breach of an implied obligation on the part of the State of Indiana to provide right of way for the road contractor during the performance of his work * * * the court said * * * it occurs to us that the plainest principles of justice require the implication of a covenant on the part of the State to provide a right of way so as to enable the Appellee (contractor) to prosecute his work to the utmost advantage and economy. Any other construction would destroy the mutuality of the agreement, and put in practically in the power of the State to defeat performance by the contractor. It is true that the contract does not expressly state that Appellant shall furnish the right of way, nor does it fix any definite time when the same should be acquired; but the clearest implication arises from the language of the agreement and its avowed object and interest that the right of way over which the proposed highway was to be constructed should be secured by the State. "* * * the principle above stated has been generally recognized and accepted by this court."

Byrne v. Bellingham Cons. School Dist., 7 Wn.(2d) 20 at 29-30.

"The remaining question is whether appellant

is equally bound by the contract set out above. It is evident that the consideration of appellee's assuming to carry said produce and incurring such liability was the implied promise of appellant to furnish it; and we believe the law will just as clearly and conclusively presume or imply such a promise on his part as if it had been set out in express words. To take any other view of the contract such as this would permit, in our judgment, a fraud and overreaching. There was a contract on one part to carry, and on the other a contract to pay so much a pound; and there was from this just as clearly a corresponding and correlative obligation to furnish for carrying. In Sedgwick's Leading Cases on Damages p. 382 is the case of *Black v. Woodrow*, 39 Md. 194, which seems to us decisive of this case, if the first objection herein made is not sufficient. It is there said 'If the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will be necessarily implied."

McCartney v. Glassford, 1 Wash. 579 at 581-582.

So far as petitioner can ascertain no interpretation of a similar insurance contract has been made by any Court. However, it would seem as if the doctrine of "*traditional notions of fair play and substantial justice*" as applied to each individual case during the past three years by the United States Supreme Court should be applicable to this case.

As examples, the United States Supreme Court

states that if certain beneficial results are received by one party, there is the implied correlative and reciprocal obligation to compensate the other party for such benefits. For instance, if a company has soliciting agents in a state there is the implied obligation to contribute to the State unemployment compensation fund.

International Shoe Co. v. State of Washington, 68 Sup. Ct. Rep. 154 at 158, 160.

The *International Shoe Co.* case, *supra*, cites with approval the following as legal authorities supporting its decision that, 'the traditional notions of fair play and substantial justice" must prevail in each case:

"The State which accords him privileges and affords protection to him and his property may also exact from him *reciprocal* duties"—in this case amendability to suit within the State even during sojourns without the State."

Milliken v. Meyer, 311 U.S. 457 at 463 (Headnotes 8-12).

"The State of New York has the power to regulate an Illinois insurance association which inures property located in New York, although the insurance contracts are signed in Illinois and losses are paid by checks mailed from Illinois.

Hoppeston Canning Company v. Thomas J. Cullen, Superintendent of Insurance et al., 318 U.S. 313, at 318.

"A citizen of the United States had removed his residence to France but had continued to owe allegiance to the United States * * *" "By virtue of the obligations of citizenship, the United States retained its authority over him" and "could penalize him by assessing a fine collect-

able from property in the United States owned by the citizen."

Blackmer v. United States, 284 U.S. 421, 436, 437.

"A citizen of New Jersey lent his automobile to a New Jersey friend for use for a day. The friend drove the car to New York and while driving there negligently struck a New York citizen. The New York statute provided that the owner of an automobile was liable for injuries to a person struck by the automobile. The owner was not in New York personally at the time of the accident and the friend was not his agent. Suit instituted in New Jersey by the injured person was upheld upon the ground that the car having been taken to New York with the owner's express or implied permission, the New York statute was enforceable."

Young v. Masci, 289 U.S. 253 at 255-256.

The foregoing doctrine of the *International Shoe Co.* case was reaffirmed in *Nippert v. Richmond*, Vol. 90 No. 9 Sup. Ct. (L. ed.) Advance Opinions 496 at 502, 505.

This court has very recently upheld the doctrine that an "implied" power may be enforced by the federal courts.

Porter v. Dicken, 66 S. Ct. 1094 at 1096.

Insurance business * * * is a business affected with *a vast public interest.*

Prudential Ins. Co. v. Benjamin, 66 S. Ct. 1141 at 1147.

A judgment ought not to be contrary to natural justice.

McDonald v. Mabee, 243 U.S. 90 at 91.

It should be noted that in each of such decisions where an obligation existed a correlative and reciprocal right could be implied therefrom. Such doctrine of "fair play and substantial justice" should be equally applicable in this case. If petitioner is still an agent of the Company, then the Company has the correlative and reciprocal duty to allow petitioner to earn his commissions of $28,580 per year, instead of being confined merely to receiving repayment of his reserved renewal commissions at the rate of $4,258 per year.

Other courts have likewise ruled that reciprocal obligations may be implied from the express language of the contract.

> "It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied—as, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or thing necessary for the completion of the contract will be necessarily implied."
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> *S. W. Light Co. v. City of Joplin*, 101 Fed. 23 at 28;
>
> *In re Silverman*, 101 Fed. 219 at 220;
>
> *William v. DeSoto Oil Co.*, 213 Fed. 194 at 198.

"Wherever one party to a contract enters upon the performance of an express obligation imposed upon him by a contract, the law implies a corresponding obligation on the part of the other party to the contract which reasonable men would understand must have been intended to be included."

Rifkin v. Safenotz, 40 Atl.(2d) 188 at 190.

"Although the contract did not expressly require the city to offer the garbage in the condition contracted for, the law will imply a covenant that the city will perform a correlative duty * * * and cannot by its own act prevent the contractor from performing the contract according to its terms * * * where a contract obliges one party to perform it, and its performance, within the intention of the parties, requires the performance of a correlative obligation by the other party, such obligation will be implied."

Atlantic City v. Farmers Supply & Products Co., 115 Atl. 388 at 389.

"This contract provides for the sale by defendant to plaintiff of a certain quantity of feed. Though the contract does not, in explicit words, recite that plaintiff agrees to purchase and pay for the same, this is clearly implied by the acceptance of the contract by the plaintiff through the signing of his name thereto."

Heffernan v. Newmond, 201 S.W. 645 at 646.

Lewis v. Atlas (61 Mo. 354), herein referred to, was an action brought for a breach of contract of agency. The court said:

"It is true, there was no positive and direct

covenant on the part of the company to carry on the business for any definite time. But the plaintiff agreed to act exclusively for the company for the term of five years, and had he neglected or failed, he would have been liable in damages. If he was bound for that length of time, it necessarily follows that the company must also have been bound; for mutuality was essential to the validity of the agreement. It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a correlative and corresponding obligation upon the other party, such corresponding and correlative obligation will be implied. As, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or thing necessary for the completion of the contract, will be necessarily implied, When plaintiff bound himself to give his exclusive services to defendant for the period of five years, there was a correlative and corresponding obligation upon the part of defendant, to give him employment and allow him to pursue and execute the terms of the contract. This was manifestly the intention of the parties."

See also the same effect:

Glover v. Henderson, 120 Mo. 367; 41 Amer. St. Repts. 695.

Wilcox & Gibbs Sewing Machine Co. v. Ewing, 141 U. S. 627; 35 L. Ed. 882.

MacGregor v. Union Life Ins. Co. of Omaha, 121 Fed. 493.

Mechem on Agency, Sec. 600.

"It is said that this contract is void for want of mutuality; but we do not think so. Appellee paid a fixed sum of money and agreed to give appellant employment for a definite time * * * In consideration of this appellee agreed to purchase from appellant the supplies * * * and, whether that amount was much or little, included all the supplies so purchased. This agreement necessarily implied that the goods should be sold at the usual and customary prices; just as such an agreement is implied in any case where goods are purchased without any definite understanding as to price."

Wilkes v. Stacy, 169 S.W. 796 at 798.

"It frequently happens that the full scope and purpose of an agreement cannot be accurately ascertained without considering the subject matter to which it relates and the circumstances under which it was executed. When a case of that kind occurs, and the necessity arises for going outside of the language employed, for the purpose of ascertaining its meaning or the probable intention of the parties thereto, a court is always privileged to do so, and may properly consider any fact or circumstances which sheds light on the transaction. The case at bar is one which, in our judgment, demands a liberal application of this doctrine. While the parties to the contract have failed to state how long it should continue in force, they have nevertheless manifested an intention to enter into a business arrangement with each other which should last for some years and until a certain expected event had occurred.

We think, therefore, that the happenings of that event should be held to limit the duration of the contract, and that until such time the logging company remains bound by its provisions."

Mississippi River L. Co. v. Robson, 69 Fed. 773 at 778-781.

"If there be ambiguities in the contract they are to be resolved against the defendant who undertook to embody into writing the agreement which the parties had made * * * Where a written contract has an apparent meaning at variance with its real meaning, it may bind the author of the ambiguity contrary to its real meaning, if this meaning was so obscurely expressed that the other party was likely to be misled and was misled."

Aldrich v. N. Y. Life Ins. Co., 139 N.E. 245 at 248.

"A contract to sell and deliver to another all that one party may require in an established business or *all the product that the other party may produce for a definite period* from a certain mill or plant does impose such a fixed obligation as to save the mutual character of the promise. In such cases the quantity sold can be made to reasonably appear and is capable of an approximately accurate estimate. And so a contract for the sale of the entire output of a mill of known capacity for a definite period would be binding although the amount so sold is not definitely ascertained. * * * Where a party originally not bound had executed the contract, the doctrine relative to mutuality does not apply."

El Dorado I. & P. M. Co. v. Kinard, 131 S.W. 460 at 462.

"The obligation of the defendant, expressed in the contract, to purchase the lumber, implied a corresponding obligation on the part of the plaintiff to sell and deliver it at the prices named, and on the stipulated terms, and the language of the contract shows an agreement on their part to sell and deliver the lumber to defendant." * * * "The contract does not present a case where the obligations are all on one side and none on the other." * * * "The case of *Minneapolis Mill Co. v. Goodnow* (42 N.W. 356) is very much in point. The court, in construing a provision (of the contract) said 'There is in this agreement no express promise on the part of Goodnow to furnish, for plaintiff to saw, the 6,000,000 feet of logs which the plaintiff is to saw for him and as he shall direct.' But that is necessarily implied. How could it saw the logs as he shall direct, unless he should furnish them? There can be little doubt that, as the parties understood this agreement when they executed it, Goodnow was thereby engaging to furnish the 6,000,000 feet of logs for plaintiff to saw, and plaintiff was engaging to saw them in the manner and at the prices specified. A third party would so understand it."

Moore v. Sharp, 125 S.W. 659, at 660-661.

See also:

Chi. R. I. & G. Ry. Co. v. Martin, 163 S.W. 313 at 314.

"Although a contract on its face appears to be obligatory on one party only, yet, if it was the manifest intention of the parties that there should be a correlative obligation on the other party, the law will imply such obligation." * * * "The implied part of the agreement is as certain

and definite as if it had been stated in so many words."

Glover v. Henderson, 120 Mo. 367 (41 Am. St. Rep. 695 at 701).

"By their 6th cross-assignment of error the defendants below present to this Court the proposition that the contract sued upon contains no promise of either of the defendants to do any act for Ben C. Jones & Co., therefore, there could be no breach where there was no promise. If this were a correct construction of the instrument, it would necessarily defeat this action, but the law implies a contract on part of the Gammel Book Company, for whom the contract was made to furnish the manuscript of the Reports * * * the failure to perform that implied agreement constituted a cause of action just the same as if the agreement had been written into the face of the contract itself."

Jones v. Gammel-Statesman Pub. Co., 8 L. R.A. (N.S.) 1197 at 1203 (n.2).

"The railroad company agreed to put in a switch at the place designated. * * * Out of the terms of this contract there arose, by implication, an obligation on the part of the ralroad company to maintain that switch in reasonably good condition for use."

Missouri K. & T. Co. v. Carter, 68 S.W. 159 at 169.

"It not infrequently occurs that contracts on their face and by their express terms appear to be obligatory upon one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative

obligation on the other party, such corresponding and correlative obligation will be implied. Among the instances given of such implied obligation is the case where A covenants or contracts with B to buy an estate of the latter at a given price. There, although the contract may be silent as to any obligation on the part of B to sell, the law implies a corresponding covenant or contract by him to sell and convey the estate."

Ferguson v. Getzendaner, 83 S.W. 374 at 376.

"The obligatory promise to have the company's outfit on the ground ready for work in two weeks after notice, and to complete the work within a given time thereafter, carried with it the implied agreement of the other party to be ready for the working outfit when it came after such notification. This mutuality of obligation carried with it accountability on the part of plaintiff in error for the loss of time necessarily occasioned by the detention of the workmen from entering upon the construction work."

Hinds v. Hinchman-Renton Fireproofing Co., 165 Fed. 339 at 341.

"If the act to be done by the party binding himself can only be done upon a corresponding act being done or *allowed* by the other party, an obligation by the latter to do or *allow to be done* the act of things necessary for the completion of the contract will be implied."

Jordan v. Indianapolis Water Co., 64 N.E. 680, 683.

(The railroad) "accepted this title with all the benefits annexed and appurtenant, and surely fairness and equity will make it perform the obligations annexed and appurtenant thereto."

Mo. K. & T. Ry. Co. of Texas v. State, 275 S.W. 673 at 679.

"Through a writing executed by partners merely recited the dissolution of the firm, the sale of one partner's interest to the other * * * but did not recite any obligation of the other partner * * * yet the other partner will be deemed to have impliedly promised to be bound by the adjustment of all matter referred to in the writing. * * *"

Dille v. Parker, 90 N.E. 520.

The following decisions of the United States Supreme Court, use language applicable to the facts in this case.

"THE DECISIONS OF THIS COURT LEAVES NO DOUBT THAT A MAN'S TIME MAY, AS A MATTER OF LAW, BE IN THE SERVICE OF ANOTHER THOUGH HE BE INACTIVE * * * THE EMPLOYER IS LIABLE * * * BECAUSE UNDER THE CIRCUMSTANCES, THOUGH HE HAD ILLEGALLY DISCHARGED THE EMPLOYEE, HE STILL ABSORBS HIS TIME. IN SHORT, AN EMPLOYER MUST PAY WAGES ALTHOUGH, IN VIOLATION OF LAW, HE HAD SUBJECTED HIS EMPLOYEE TO ENFORCED IDLENESS." (MR. JUSTICE FRANKFURTER)

Social Security Board v. Nierotko, Vol. 90—No. 9 U.S. Sup. Ct. (L. ed.) Adv. Opin. 594 at 602.

"The underlying rationale of the law against unreasonable restraints is two-fold. The first of these reasons is that the law will not lend its aid in enforcement of a contract by means of

which a man may deprive himself of the possibility of earning a livelihood and deprive the public of the benefit of his labor." The second, "that such restraints tended to give * * * the beneficiary of such restraints, a monopoly of the trade from which he had thus excluded one competitor and by the same means might exclude others."

> *Scott Paper Co. v. Marcalus Mfg. Co.* (U.S. Supreme Ct.) Vol. 90, No. 2 Sup. Ct. (L. ed.) Adv. Opin. 88 at 92 n.2.

"To be sure, Congress had not said in so many words that the seller of a patent * * * is subject * * * to the obligations of fair dealing." * * * Until this day such a sophistical argument to accomplish overreaching in a business transaction had uniformly been rejected by the courts, and it has been rejected by this Court on basic considerations of "fair dealing." (9A) * * * "the principle of fair dealing" * * * "has been a part of the fabric of our law throughout the life of this nation." (94) * * * "the isolated, individual relation between assignor and assignee, due to the sale by the assignor of something which he afterwards should not be allowed to say was nothing, is the basis of the doctrine of fair dealing which operates against him and against nobody else." (95) * * * "what is there in reason * * * that should preclude enforcement of a fair bargain whereby an individual agreed, in effect, not to compete with another * * *" (95) * * * "Happily law is not so divorced from ethical standards that a hitherto unquestioned principle of fair dealing should be deemed hostile to any branch of the law." (96) * * *

Scott Paper Co. v. Marcalus Mfg. Co. (Vol. 90—No. 2 Sup. Ct. (L. ed.) Adv. Opin. 88 at 94-96.

Mr. Justice Frankfurther, dissenting in the foregoing cases, states:

"When by a fair and free bargain a man sells something to another, it hardly lies in his mouth to say 'I have sold you nothing.' It certainly offends the rudimentary sense of justice for courts to support one who purports to sell something to another in saying 'What I have sold you is worthless,' even though he did not expressly promise that what he sold had worth. The obvious implications of fair dealing in commercial transactions have been part of our law for at least a hundred years."

Scott Paper Co. v. Marcalus Mfg. Co. (U.S. Supreme Ct. Nov. 13, 1945) Vol. 90—No. 2 Supreme Ct. (L. ed.) Adv. Opin. 88 at 93.

"Determination of the issue of the right of Congress to regulate holding companies and to provide a plan for the reorganizaztion of such company, 'must meet the standards of fairness and equitableness'."

North Am. Co. v. Sec. & E. Com. (Apr. 1, 1946) Vol. 90—No. 12 U.S. Sup. Ct. (L. ed.) Adv. Opin. p. 737 at 749.

"This case does not turn on technical agency rules such as apply in the simple, individualistic situation where P deals with T through A about the sale of Blackacre. We are here dealing with problems in a specialized field, with a long background of custom and practice in the railroad world * * * custom and usage may be as adequate

a basis of authority as a more formal authorization of the union * * * (Headnote 1, 707).

Elgin, Joliet & Eastern R. Co. v. Burley (March 25, 1946) Vol. 90—No. 11, U.S. Cup. Ct. (L. ed.) Adv. Opin. p. 706 at 707.

That appellant is entitled to his right to earn his regular yearly stipend, or be awarded damages in lieu thereof, is upheld in the following decisions upon analagous facts:

"The plaintiff sought to establish his damage by comparing his profits before and after the unlawful interference with his business * * *(585) * * * The jury may make a just and reasonable estimate of the damage based upon relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof. * * * The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created * * * the wrongdoer may not object to the plaintiff's reasonable estimates of the cause of injury and of its amount. (p. 585) * * * The constant tendency of the courts is to find some way in which damages can be awarded where a wrong had been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of plaintiff's rights. * * * The comparison of petitioners' receipts before and after respondent's unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage, where the defendant's wrongful action had prevented petitioners

from making any more precise proof of the amount of the damage."

Bigelow v. RKO Radio Pictures, Vol. 90—No. 9 (U.S. Sup. Ct.) (L. ed.) Adv. Opinions 579 at 585, 586.

"If the agency * * * was wrongfully terminated plaintiff's remedy would be for breach of contract in which the probable value of his interest in future premiums would be an element of his damage."

Hart v. Lincoln Nat. Life Ins. Co., 174 N. W. 740 at 741.

"In an action by an insurance agent against an insurance company for wrongful dismissal from its service he may recover the value of probable renewal of policies actually obtained by him."

Aetna Life Ins. Co. v. Nexsen, 84 Ind. 347 (43 Am. Rep. 91 at 92-94).

"I know of no way of judging the future except by the past." Judgments thus formed are not always accurate, but they are sufficiently so as to control the actions of reasonable men in the most important affairs of life; and we think this standard is sufficiently accurate to have enabled the jury in this case to estimate the amount of proffits which Griswold would have received under his contract had he been permitted to carry it out." * * * The insurance company breached its contract with Griswold, by reason of which it became liable to him for all such damages as reasonably resulted from such breach."

Merchants Life Insurance Co. v. Griswold, 212 S.W. 807 at 813.

The undeniable fact in this case is that petitioner

has been discharged by respondent admittedly WITHOUT CAUSE and for no understandable reason. Respondent practically admitted in its brief to the Circuit Court of Appeals (p. 150) that this is one of the cases which respondent does not dare to submit to a jury of petitioner's peers.

Courts should not be an instrumentality to promote a wrongful result whether of a physical, moral, or economic nature. The court has power to make a direct assault upon an economic evil which materially affects the labor relation of many employers with their employees.

> "New situations call for new adaptation of judicial remedies."
>
> *Radio Station WOW v. Johnson*, 326 U.S. 120 at 132.

> "The purpose of all interpretation is to ascertain and give effect to the intention of the parties to the contract as expressed in their writing, and in doing this it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties and the cause in which, taking these things into consideration, the words used would be commonly understood; for it fairly may be assumed that the parties used and understood them in that sense."
>
> *ALf Bennett Lumber Co. v. Walnut Lake Cypress Co.*, 151 S.W. 275 at 277.

Petitioner submits that he bought and paid for employment with respondent at least for so long as petitioner remains a member of Nylic by furnishing to respondent several different considerations other

than the services to be performed by petitioner, the most important of which was giving up at the specific request of respondent his bank position and bank career for a life career with respondent, under certain oral provisos stipulated by respondent, said provisos being if Nylic should be reinstated and petitioner should stay with respondent for 20 years and qualify as a Senior Nylic, all of which was admittedly done by petitioner (R. 124d).

There is a long list of important cases on the question of "Consideration other than the services to be performed," (which we will omit for the sake of brevity). However we cite one important case which is four square in point, to-wit:

Reifkin v. E. I. Dupont DeNemours & Co.,
290 Fed. 286, 53 App. D. C. 311.

Considerations furnished by petitioner to respondent other than petitioner giving up his bank career at respondent's request are:

1. "A Nylic can have no other business or occupation for profit or gain" (Gen. Rule No. 1 (R. 109), which restrictive measure of course deprived the petitioner from making substantial sums of money outside of life insurance.

2. "Senior Nylics shall receive so long as they live, provided only that they shall not enter the service of any other life insurance company, monthly payments as follows (R. 106)": which prohibited petitioner from competing with the respondent, thereby causing the petitioner to lose substantial sums.

3. Petitioner entered into Nylic at request of re-

spondent (R. 124) and continued thereunder for 28 years. "Continuous service does constitute consideration on the theory that appellee at its (employer's) request benefited thereby" *Goldberg v. John Hancock Mutual Life Ins. Co.* (N.J., 1938) 1 Atl.(2d) 483.

The case at bar is fraught with a "Public Interest" because the respondent by a combination of restrictive Nylic covenants in Nylic contract, "F" and a wrongful act committed against the petitioner, were intended to have the effect and have had the effect of preventing other life insurance companies from employing a citizen, the petitioner, thereby depriving a citizen, the petitioner, from his legal right to earn his livelihood.

The said wrongful act which respondent committed against petitioner was:

> "Maliciously disseminating false and damaging information regarding the plaintiff to other life insurance companies." (Bill of Particulars, R. 126, (10).)

The restrictive covenants in petitioner's Nylic contract "F" are as follows:

(1) "A Nylic (which means all Nylics because no distinction is made) can have no other business or occupation for profit or gain." (R.109)

(2) "Senior Nylics shall receive as long as they live, provided only that they shall not enter the service of any other life insurance company, monthly payments as follows." (R. 106)

No corporation by a combination of contractual restrictive covenants like those employed by respon-

dent in its Nylic contract, can combine them with wrongful acts to prevent a citizen from earning his livelihood, and that is just what respondent has done to petitioner, which obviously is against public policy.

A contract of service which contains express or implied stipulations as to the duration of the employment, is not a contract of general hiring terminable at will, but is a contract compelling its continuance during the express or implied period.

We submit that the Nylic contract, (R. 493) which makes Nylic No. 2; ("F," R. 91-112) a part thereof contains an express or implied stipulation that the duration of petitioner's employment shall last so long as petitioner remains a member of Nylic. This is a fixed period of employment. It may be for life and it may not be, but this does not alter the fact that it is a fixed period of employment.

All the leading cases hold, that unless a contract contains either an express or implied period of employment, or good consideration other than the services to be rendered under the contract, it is nothing but a general hiring, terminable at will, but we submit that petitioner's Nylic contract does contain an express and implied period for employment, to-wit: "So long as I remain a member of Nylic" and that in connection with said Nylic contract, as pointed out elsewhere in this brief, the petitioner furnished respondent several good considerations other than the service to be performed. Therefore petitioner's Nylic contract is

definitely removed from the realm of being a general hiring, terminable at will. This Court is conversant with the long list of cases establishing such fundamental legal principles.

Petitioner respectfull submits that the foregoing authorities demonstrate that so long as the Senior Nylic relationship exists whereby petitioner cannot be gainfully employed elsewhere, then the legal doctrine of 'fair play and substantial justice' should be made applicable and petitioner be paid by respondent the damages which were caused by respondent's failure to carry out its reciprocal, correlative and corresponding obligation of retaining petitioner in his regular agency employment.

Point III.

Petitioner never exchanged his Senior Nylic agency right of employment for a terminable agency at a higher compensation.

The District Court, in its memorandum opinion (R. 151-152) dismissing plaintiff's Third Cause of Action, in two separate paragraphs, used language from which any reasonable person would infer that petitioner by virtue of attaining the Senior Nylic status had acquired a life-agency but that the petitioner had the right to barter it away and did barter it away by entering into agreement "D," (R. 50-65) "with its higher schedule of compensation."

In as much as the court did not make any explanation as to what he meant by "Schedule of Higher

Compensation," the first obvious question that his conclusion suggests is, *a higher schedule of compensation over what compensation?*

In the first place the question of "Compensation" in Ex. "D" (R. 50-65) has not the slightest bearing on voiding petitioner's Senior Nylic agency. If, as the Court stated or implicated, that petitioner had a life-agency as a Senior Nylic, the petitioner still retains same, because agreement "D," in section 23 (R. 65) specifically provides that "D" "cannot alter or effect anything that was vested in petitioner's Nylic membership." The question now is what does petitioner's Nylic membership embrace? Petitioner respectfully submits that it inherently embraces employment for so long as appellant remains a Senior Nylic.

The plain facts, as shown hereinafter, clearly establishes that agreement "D," *not only did not provide for any higher schedule of compensation than petitioner had priorily earned or received but that "D" did not contemplate any higher compensation.*

All life insurance companies, if they were so minded, could pay their soliciting agents a yearly renewal of 5% during the life of each policy because every premium is fully loaded and moreso for this purpose. Therefore, every full-time agent of respondent whether the agent be a Qualifying Nylic agent, or a Senior Nylic agent or a non-Nylic agent is always entitled to receive the minimum traditional 9 renewals of 5% each, (45%), or the equivalent of 45%. Whether a Qualifying Nylic agent receives his renewals of 45%, divided

30% in Nylic payments, (Nylic being the name for deferred renewal) and direct renewal of 15%, or whether a Senior Nylic receives his 45% in the form of 9 direct renewals of 5% each, makes no difference. Never did truer exception prove the rule. The petitioner under agreement "B," as a non-Nylic agent, had the traditional 9 renewals of 5% each, (45%).

When the respondent inveigled petitioner to allow respondent to substitute respondent's DUAL AGENCY, comprising Nylic, (F) and agreement "C" for petitioner's agreement "B" the respondent represented to petitioner that his compensation during the qualifying Nylic period would be equal to or exceeded by the combined compensation under "F" and "C," made up, 30% under "F" and 15% under "C."

The respondent at the same time further represented to petitioner that when he became a Senior Nylic and thereafter would not be allowed to earn the Nylic 30% compensation, the respondent then would give petitioner a Senior Nylic agency agreement providing for the traditional nine renewals of 5% each, (45%), the same compensation that petitioner had in his surrendered agreement "B," which representation the respondent fulfilled.

If, as represented by respondent to petitioner that its Nylic compensation of 30% combined with one renewal of 15% will equal or exceed the traditional 9 renewals of 5% each, (45%), then it must follow by the respondent's own statement, that agreement "D," with its 9 renewals of 5% each, did not pay petitioner as much compensation, (certainly not more)

than petitioner earned or received under either "B" or "F" and "C," thus rendering nugatory the dis-district court's erroneous conclusion that "D" provided for a "Higher Schedule of Compensation" and by reason thereof, petitioner bartered away his life-agency.

"B"	equalled	45%
"F" & "C" together	equalled	45%
"D"	equalled	45%

Thus, according to "B" and "D" and the combination of "F" and "C," and the respondent's representation relative to the compensation under "F" and "C," the compensation under all three sets of contracts was the same, to-wit: 45%.

It has long been a mooted question between respondent and its competitors and has been bitterly argued between them as to whether respondents Dual Agency, paying 15% in renewals and the balance under several different Nylic formulae, equals or exceeds the traditional 9 renewals of 5% each, (45%) paid by respondent's competitors.

In so far as the petitioner knows neither the respondent nor any other life insurance company has ever reduced to writing to prove whether the traditional 9 renewals of 5% each, (45%) will pay an agent less, the same, or more compensation than respondent's Dual Agency of Nylic and one renewal of 15%. However, the petitioner knows, as many thousands of other agents know, among the ranks of the respondent and its competitors, that the respondent represents to prospective new agents, as it did

to petitioner, that its Nylic compensation plus 15% in renewals is as good or better than the traditional 9 renewals of 5% each (45%); contrariwise that all companies who pay the traditional 9 renewals of 5% each represent that such compensation (45%) is as good or better than the respondent's said dual agency of Nylic and one renewal of 15%.

The only way that the District Court could correctly conclude that "D" contained a "Higher Compensation" than that which petitioner had in his prior contracts, 'B," and "F" and "C" was to have the respondent furnish the court a detailed accounting which we submit, the court did not ask for, nor was it volunteered by the respondent. Even had it been requested by the court, its revelation would have been immaterial, because, as previously stated, agreement "D," in section 23d, expressly provides that "D" cannot alter or effect petitioners Nylic membership, in which membership employment is inherent for so long as petitioner remains a Senior Nylic.

Paradoxical as it may seem, but nevertheless a fact, the respondent will pay any new agent who comes off the street and works for the respondent for the first time, the same 45% in renewal commissions that respondent gave the petitioner as a Senior Nylic in 'D," and that in the face of the significant facts that petitioner had rendered to respondent 20 years of continuous and faithful service, during which time the petitioner made the respondent a big profit and in many other important respects protected and advanced the company's interests. While the petitioner,

as a Senior Nylic, was entitled to more compensation under "D," the fact still remains that he did not receive any higher compensation of any sort under "D."

It is an undeniable fact that during the fifteen years prior to the cancellation of his contract, petitioner had been earning an average compensation of $28,500 per year under his Senior Nylic agency agreement relationship. It is unimaginable that petitioner would be content to accept merely $4,258.68 per year—the amount of the deferred renewal payments earned during the 20 year probationery period —in exchange for $28,500 per year. For eight years during his Senior Nylic activities, petitioner had been paid such average stipends in the larger amount and respondent had acquiesced in petitioner's understanding that he would be an active agent of the company during the continued existence of petitioner's Senior Nylic contract, earning such larger amounts. Respondent should now be estopped from claiming that such larger compensation be denied petitioner.

Petitioner submits that one of the objectives of "Nylic" was to make the relation fiduciary between respondent and its Nylic agents, especially as between it and its Senior Nylics.

If "Nylic" created a fiduciary relation between respondent and petitioner and petitioner has never ceased to be a Nylic agent, the said fiduciary relation still exists.

Respondent in its book, "Studies in Practical Life Insurance" (Bill of particulars, (R. 123, (2) states, "It (Nylic) made the interest of the company the interest of the agent." That is manifest, because in order for a Nylic agent to be successful and fulfill the terms of his Nylic contract he at all times must advise his clients as much in the interest of the respondent as well as in his own behalf. These things constitute a fiduciary relation. The fact that the respondent operates under the branch office system and not under the traditional general agency system and makes all of its contracts direct with its agents is added proof that a fiduciary relationship was contemplated.

Petitioner's agreement "B" was a highly valuable unrestricted agency contract, rarely, if ever, made more liberal by respondent or any other life insurance company, whereas, the combination of "F" and "C" was highly restrictive and of speculative value as compared with "B." The petitioner reposed tremendous confidence in respondent when petitioner allowed respondent to substitute "F" and "C" for "B." Here is demonstrated the highest standard of a fiduciary relationship.

When a fiduciary relation exists it is not necessary under the law to allege fraud, undue influence, coercion or over-reaching which accounts for the fact that petitioner did not allege any of these things in his complaint or bill of particulars.

Mr. L. Seton Lindsay, while agency director of respondent's Seattle Branch Office, made the following

representation to petitioner which induced petitioner to give up his bank position and to enter Nylic contractual relations with respondent.

> "That L. Seton Lindsay, Agency Director of the Seattle Branch Office, represented in January, 1908, to plaintiff that if plaintiff would give up his position with the Dexter Horton National Bank of Seattle and become a full-time agent of the New York Life Insurance Company, and that if Nylic should be reinstated and plaintiff would stay with the defendant for twenty years he would thereafter have a guaranteed monthly life income and employment for life." (R. 142-(5))

Mr. A. S. Elford, made the following representation to petitioner in 1928 which induced petitioner not to retire under his Senior Nylic income but to continue for life in the service of respondent.

> "A. S. Elford, in the capacity of Inspector of Agencies of defendant's Western Department in Seattle about August 1, 1928, represented to plaintiff that agency agreement, plaintiff's Exhibit 'D,' was simply a commission contract and that Section 20 of the agency agreement (plaintiff's Exhibit 'D') did not apply to plaintiff as a Senior Nylic." (R. 124-125)

Petitioner believes that both Mr. Lindsay and Mr. Elford made their said representations and interpretations of the Nylic contract in good faith and in accordance with their honest opinions; however, if they did not, then they both purposely deceived and defrauded petitioner. In this connection it is pertinent, and should be noted here that both Mr. Lindsay

and Mr. Elford had self-interest in making said representations and interpretations to petitioner because both of them had contracts with the respondent company which paid them a bonus or overwriting commission on all cases that petitioner wrote for respondent through their respective offices.

The final report and recommendations, Document 35, of the Temporary National Economic Committee, dated March 31, 1941, pages 42-3, contains the following recommendation to State legislatures:

> "The statute should also declare life insurance officials not only in fact, but in the eyes of the law, trustees *required to adhere to the strictest fiduciary standards*, and appropriate civil and criminal penalties should be demanded."

The respondent in Nylic No. 2, sets forth several extended illustrations to show what a qualifying Nylic agent will earn and what his monthly lifetime Senior Nylic commissions will be on the basis of an assumed amount of production, which assumed production, we submit, is greater than that produced by the average qualifying Nylic Agent. According to these attractive figures of the respondent's own choosing the final illustration shows such a Nylic will earn a monthly Senior Nylic of $71.10. Petitioner believes that the average Senior Nylic income is less than $71.10 a month. The Senior Nylic of petitioner is $354.89 a month, which is five times greater than $71.10 a month, thereby making it a mathematical fact that the petitioner during his 20 year qualifying Nylic period produced at least five times more business

and made respondent five times more profit than respondent's average Senior Nylic. This exceptional Nylic record which petitioner made creates a strong presumption that respondent used it as a means to and did thereby secure many Nylic agents with its large attending profits. The dates of petitioner's contracts, Oct. 7, 1907, and Jan. 1, 1908, and "F" and "C" effective as Jan. 1, 1911, establish that the petitioner went to the rescue of respondent when the respondent was in serious troubles as a result of the Armstrong investigation in 1905-06 and the Panic of 1907. The letter written by Mr. Whitney to petitioner, on Jan. 5, 1928 (R. 135), portrays accurately the then status of petitioner, which status we submit, was no different 8 years later when respondent made this contemplible attack upon petitioner and we urge that it be read by the court. In this same connection we suggest that the court read Mr. Buckner's letter (R. 136) to petitioner. Both of these letters create a strong presumption that petitioner, as a Senior Nylic was entitled to employment so long as he remains a Senior Nylic.

Happily in this case, the courts can take judicial notice of government records.

> As the Ninth Circuit of Appeals has rightly held "the courts can consider the legislative history of corporate activities *and the hearings before Congressional Committees* can be gone into to review such activities."
>
> *Bowles v. Wheeler*, 152 F.(2d) 34 at 38 (Bone, Circuit Judge, Oct. 1, 1945).

On February 6, 1939, Hon. William O. Douglas, while Chairman of the Securities and Exchange Commission, said the following to the TEMPORARY NATIONAL ECONOMIC COMMITTEE CONGRESS OF THE UNITED STATES (TNEC) which was appointed by the Federal Government to investigate the concentration of economic power in the New York Life Insurance Company (and other large corporations) (Book 4, page 1162-3 (TNEC hearings)).

> "The last comprehensive analysis of the life-insurance business by an agency of the Government was the study made by the so-called Armstrong Committee, of which Charles Evans Hughes, now Chief Justice of the United States, was counsel. I earnestly recommend to each member of this committee a careful reading of the Armstrong report.
>
> "Through the device of proxies and otherwise, the then officials of such companies were found to occupy, as the Armstrong report put it, 'UNASSAILABLE POSITIONS,' and to exercise "DESPOTIC POWERS,' over the companies. Only an insignificant number of policyholders exercised their right to vote, and the Armstrong Committee stated that *the most fertile source of abuses in life insurance administration had been the sense of irresponsibility of the officials then in power.* That was in 1906. Since 1906 there has been a tremendous and spectacular growth of insurance."

The officers of respondent who wrongfully discharged petitioner and the officers who have kept petitioner from being reinstated have injured respondent's policyholders in many ways, thereby prov-

ing their further "Sense of Irresponsibility" as reported by the Armstrong Committee.

The officers of respondent company, without the slightest legal reason, have (1) subjected its policyholders to the large expenses incident to this unprecedented litigation; (2) have deprived the policyholders of the big profit on petitioner's customarily large and preferential class of risks; (3) have deprived the policyholders of petitioner's inspirational leadership which translated into money has meant a big loss; (4) have deprived respondent's other Nylic agents the loss of the canvassing value of petitioner's customary select list of clients which translated into money has meant a big loss; (5) has undermined the security which every Nylic thought that he had under his Nylic contract; (6) has caused a number of otherwise loyal and boosting policyholders to lose faith in respondent because they feel that respondent has wrongfully discharged and persecuted petitioner; (7) has furnished respondent's powerful competitors with good arguments why prospective agents should not become Nylics. Not to mention cluttering up the courts with unnecessary litigation and expenses incurred therewith.

We submit that the reprehensible conduct of respondent in wrongfully discharging petitioner without cause, wrongfully causing him to be blacklisted, and wrongfully causing him to be unable to earn his livelihood, and for further reasons just cited, show as much, or a greater "Sense of Irresponsibility" and "Abuse of economic power" than anything that was unearthed against the New York Life Insurance Com-

pany by either the "Armstrong Committee" or the "Temporary National Economic Committee."

The foregoing being true, the motion to dismiss should have been overruled by the trial court. Petitioner respectfully submits that the contracting documents, together with all the facts and circumstances alleged in the complaint, bill of particulars and the accompanying exhibits, present a question of fact for the jury's determination as to whether a contract of service co-extensive with petitioner's membership in Nylic existed, and if the jury so find, whether the respondent breached the same and the amount of damage resulting from any breach thereof by respondent.

PRAYER

It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision of the United States Circuit Court of Appeals for the Ninth Circuit.

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CERTIFICATE

The undersigned as counsel for Petitioner in the foregoing Petition for Writ of Certiorari, hereby certifies that said Petition is well founded and not interposed for delay.

Daniel B. Trefethen

Attorney for Petitioner.